

No. 16472

United States
Court of Appeals
for the Ninth Circuit

ALAN D. MACLEAN and FRANCIS D. MAC-
LEAN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN,
Assistant U. S. Attorney,
808 Federal Building,
Los Angeles 12, California.

In the District Court of the United States for the
Southern District of California, Central Division

No. 506-58—HW

ALAN D. MacLEAN and FRANCIS D. MacLEAN,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

For Recovery of Estate Taxes

Come now the plaintiffs and complain of the defendant as follows:

I.

Plaintiffs, Alan D. MacLean and Francis D. MacLean, are executors of the last will and testament of Elizabeth Beatrice MacLean, deceased. The plaintiffs bring this action against the United States of America to recover estate taxes erroneously and illegally assessed and collected by defendant from plaintiffs. Plaintiffs are citizens of the United States, and jurisdiction is conferred upon this court by 28 USC §1346(a)(1).

II.

Elizabeth Beatrice MacLean died February 20, 1954, a resident of the City of Pasadena, County of Los Angeles, and State of California, leaving a last will and testament, which was duly admitted to

probate in the Superior Court for the County of Los Angeles, State of California, to which jurisdiction in that behalf belonged, and on June 9, 1954, letters testamentary were duly issued out of said court to the plaintiffs, Alan D. MacLean and Francis D. MacLean, who duly qualified as the Executors of the said last will and testament and that at all times hereinafter mentioned, acted as such Executors.

III.

The plaintiffs have a just claim against the defendant for the sum of \$77,675.93 together with interest as provided by law which said sum was paid by the said Executors of the estate of Elizabeth Beatrice MacLean to the defendant through the duly appointed and qualified acting District Director of Internal Revenue for the Southern District of California as hereinafter set forth. The claim is founded upon the laws of the United States relating to internal revenue, to wit: The Internal Revenue Code of 1939, as amended, particularly the section of said Code relating to Federal Estate Tax being §811(c)(1)(b) of the Internal Revenue Code of 1939 (now §2036 of the Internal Revenue Code of 1954).

IV.

On May 17, 1955, said Executors duly executed and filed the United States Estate Tax Return of said estate, in accordance with the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance

thereof. There was no estate tax shown to be due and payable on said return.

V.

Thereafter on June 3, 1957, the District Director of Internal Revenue assessed an additional tax of \$69,045.27. The Commissioner erroneously assessed the tax by including in the gross estate of the decedent, Elizabeth Beatrice MacLean, the value of property transferred by the decedent on January 12, 1923, on the ground that certain changes in the trust arrangement which occurred on May 27, 1931, subjected the transfer to estate tax under §811 (c)(1)(b) of the 1939 Code.

VI.

On August 5, 1957, the said executors of said estate deposited with the duly appointed and qualified acting District Director of Internal Revenue for the Southern District of California the sum of \$77,675.93 to be applied in payment of such United States Estate Tax as was assessed as additional tax in the amount of \$69,045.27 together with interest in the amount of \$8,630.66.

VII.

On September 3, 1957, said executors duly filed with the Commissioner of Internal Revenue in accordance with the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, a Claim for Refund of \$77,675.93 and therein duly demanded the

refund and repayment of said sum. A copy of such Claim for Refund is attached hereto as Exhibit "A."

VIII.

On March 13, 1958, the Commissioner of Internal Revenue denied and rejected the said Claim for Refund and a notice was mailed by registered mail on said date. A copy of said notice of disallowance is attached hereto as Exhibit "B."

IX.

No part of the sum claimed in the refund claim has been credited, refunded or repaid to the plaintiffs or to anyone for their account.

Wherefore, plaintiffs claim judgment against the defendant in the amount of \$77,675.93 with interest thereon as provided by law.

Dated: 27th day of May, 1958.

Respectfully submitted,

/s/ ERNEST R. MORTENSON,

/s/ FREDERICK L. BOTSFORD,
Attorneys for Plaintiffs.

Duly verified.

EXHIBIT A

U. S. Treasury Department
Internal Revenue Service

CLAIM

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

Name of taxpayer or purchaser of stamps: Estate of Elizabeth Beatrice Maclean, Deceased. Frank D. Maclean, et al., Executors, c/o Frederick L. Botsford, 105 S. Los Robles Ave., Pasadena, Calif.

1. District in which return (if any) was filed: Los Angeles.

2. Name and address shown on return, if different from above: Frank D. MacLean, 2578 Boulder Road, Altadena, California.

3. Period:.....

4. Kind of tax: Estate.

5. Amount of assessment: \$69,045.27.
\$8,630.66 interest.

Dates of payment: August 14, 1957.

6. Date stamps were purchased from the Government:

7. Amount to be refunded: \$69,045.27 and interest.

8. Amount to be abated (not applicable to income, estate, or gift taxes):

9. The claimant believes that this claim should be allowed for the following reasons: See Rider Attached.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

ESTATE OF ELIZABETH
BEATRICE MACLEAN,

/s/ FRANK D. MACLEAN,
Executor.

/s/ ALAN D. MACLEAN,
Executor.

Dated August 30, 1957.

Instructions

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, both husband and wife must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an

authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Rider

A non-taxable estate tax return was filed for Decedent Elizabeth Beatrice Maclean on or about May 19, 1955. Under date of June 3, 1957, examining officer John D. McGrew issued a report in which a tax deficiency of \$69,045.27 was determined. The ground for assertion of the deficiency was that the

corpus of an inter-vivos trust should be included in gross estate pursuant to the provisions of Section 811(c)(1)(b) of the Internal Revenue Code of 1939 because of the reservation of a life estate by decedent. The determination of the deficiency is erroneous because decedent's inter-vivos trust was created in 1923. Section 811(a)(1)(b) specifically provides that transfers made before March 4, 1931, are not subject to its provisions.

Estate of Elizabeth Beatrice Maclean, Deceased;
Frank D. Maclean, et al., Executors.

EXHIBIT B

U. S. Treasury Department
Internal Revenue Service
District Director
Los Angeles 12, Calif.

March 13, 1958

In Reply Refer to: FL-219 1232:796.

Estate of Elizabeth Beatrice Maclean, Dec'd.
Frank D. Maclean, et al., Executors,
c/o Frederick L. Botsford, Attorney,
105 So. Los Robles Ave.,
Pasadena 1, Calif.

Claim for Refund of \$69,045.27.

Taxable Period: Date of Death Feb. 20,
1954.

In accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

/s/ R. A. RIDDELL,
District Director.

Registered: 154780.

FL-219.

[Endorsed]: Filed May 28, 1958.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,
UNITED STATES OF AMERICA

Comes now the defendant, United States of America, and for answer to plaintiffs' complaint, admits, denies and alleges as follows:

1. Denies the allegations of paragraph I, except it is admitted that plaintiffs, Alan D. Maclean and Francis D. Maclean, are executors of the last will and testament of Elizabeth Beatrice Maclean, deceased; that plaintiffs bring this action against the United States of America to recover estate taxes assessed and collected by defendant from plaintiffs; and that plaintiffs are citizens of the United States, and that jurisdiction is conferred upon this Court by 28 U.S.C., Section 1346(a)(1).

2. Admits the allegations of paragraph II.

3. Denies the allegations of paragraph III.

4. Denies the allegations of paragraph IV, except it is admitted that on May 19, 1955, and not May 17, 1955, as alleged, said executors filed the United States estate tax return of said estate and that there was no estate tax shown to be due and payable on said return.

5. Denies the allegations of paragraph V, except it is admitted that on July 8, 1957, and not June 3, 1957, as alleged, there was assessed a tax of \$69,045.27.

6. Denies the allegations of paragraph VI, except it is admitted that on or about August 15, 1957, the executors of said estate deposited with the District Director of Internal Revenue for the Southern District of California the sum of \$77,675.93 in payment of deficiency estate tax determined by the Commissioner of Internal Revenue in the sum of \$69,045.27 and interest of \$8,630.66, all of which was duly assessed on or about July 8, 1957.

7. Denies the allegations of paragraph VII, except it is admitted that on September 3, 1957, said executors filed with the Commissioner of Internal Revenue a claim for refund of \$77,675.93. Admits that Exhibit "A" to the complaint is a copy of said claim, but, except as specifically admitted herein, defendant denies each and every allegation contained in said claim for refund.

8. Admits the allegations of paragraph VIII.

9. Admits the allegations of paragraph IX.

Wherefore, having fully answered, defendant prays for judgment in its favor, for dismissal of plaintiffs' complaint with prejudice and for all costs and disbursements herein.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN,
Assistant U. S. Attorney;

/s/ EUGENE N. SHERMAN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 30, 1958.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed as follows, by and between the parties hereto, through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent herewith and without prejudice to their right to object to the materiality, relevancy, or competency of any of the following facts agreed to; and it is further stipulated and agreed that any

instrument or document referred to herein as an exhibit, or a photo reproduction thereof, may be introduced into evidence without any foundation being laid as to the authenticity, without prejudice to the right of any party to object to the competency (except as hereinabove provided), materiality, or relevancy thereof:

I.

Plaintiffs are citizens of the United States and jurisdiction is conferred upon this Court by 28 U.S.C. §1346(a)(1).

II.

Elizabeth Beatrice Maclean died February 20, 1954, a resident of the City of Pasadena, County of Los Angeles, State of California.

III.

Alan D. Maclean and Francis D. Maclean are the duly appointed and acting Executors of the Last Will and Testament of Elizabeth Beatrice Maclean, deceased, and represent her estate.

IV.

On May 19, 1955, the Executors filed a United States Estate Tax Return for said estate. There was no estate tax shown to be due and payable on said return. Attached to said return were copies of (1) a Trust Indenture dated January 12, 1923, executed by the decedent (attached hereto as Exhibit "A"); (2) a Revocation of said Trust Indenture dated May 27, 1931, and executed by the decedent and her husband, John Alexander Mac-

lean, (attached hereto as Exhibit "B"); and (3) a Trust Indenture dated May 27, 1931, executed by the decedent and L. L. McArthur, Jr., Vice President of the Northern Trust Company (attached hereto as Exhibit "C").

V.

The corpus of said Trust created January 12, 1923, was transferred by John Alexander Maclean, Trustee, to the Northern Trust Company, Trustee, on May 27, 1931.

VI.

The Trust in existence as a result of the execution of the foregoing exhibits was in existence at the date of decedent's death.

VII.

The District Director of Internal Revenue on July 8, 1957, assessed an additional tax of \$69,045.27 resulting from the inclusion in decedent's gross estate of the fair market value, as of the date of decedent's death, of the corpus of the Trust then in existence. Plaintiffs paid the additional estate tax assessment of \$69,045.27 together with interest in the amount of \$8,630.66, a total of \$77,675.93, on August 15, 1957.

VIII.

Plaintiffs filed a Claim for Refund of \$77,675.93 with the Commissioner of Internal Revenue on September 3, 1957.

IX.

The Commissioner of Internal Revenue denied

and rejected the said Claim for Refund on March 15, 1958.

X.

No part of the sum claimed in the refund claim has been credited, refunded or repaid to the plaintiffs or to anyone for their account.

Dated: September 29, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

EUGENE N. SHERMAN,
Assistant U. S. Attorney;

/s/ EUGENE N. SHERMAN,
Attorneys for Defendant,
United States of America.

ERNEST R. MORTENSON and
FREDERICK L. BOTSFORD,

By /s/ ERNEST R. MORTENSON,
Attorneys for Plaintiffs, Alan D. and Francis D.
Maclean.

EXHIBIT A

This Indenture, made this 12th day of January, 1923, by Elizabeth Beatrice Maclean, of Chicago, Illinois,

Witnesseth:

That said Elizabeth Beatrice Maclean, for and in consideration of One (\$1.) dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, does hereby convey, transfer and assign unto John Alexander Maclean, as Trustee, the securities described in Schedule A hereto attached and made a part hereof, which schedule is signed by the parties hereto for identification, to Have and to Hold the same subject to the following trusts, purposes and conditions, to wit:

During the period of trusteeship as hereinafter fixed the Trustee shall hold, manage, care for and protect said trust estate and collect the income therefrom, all in accordance with his best judgment and discretion. The Trustee may hold said trust estate in its present form of investment and is also fully authorized to invest such part of the same as may be converted from time to time into cash in bonds, stocks, real estate mortgages, or in any other income-producing securities, that he thinks best, said Trustee to have as wide latitude in the selection and making of any investments as if he were the absolute owner of said property, and not to be restricted to investments for trustees as fixed by the laws of the State of Illinois. Said Trustee is hereby given full power to sell and convey any and all of said trust property and any reinvestment thereof from time to time for such prices and upon such terms as he sees fit and no purchaser or purchasers shall be obliged to see to the application of the purchase money.

In case of the death, resignation or failure for any reason of said John Alexander Maclean to act as such Trustee then The Northern Trust Company, a corporation existing under the laws of the State of Illinois and located at Chicago, Illinois, shall be the Trustee hereunder with all the rights, titles and powers, whether discretionary or otherwise, which are granted hereunder to said John Alexander Maclean and said The Northern Trust Company, as such Trustee, shall be paid a fair and just compensation out of the trust estate for its services hereunder.

The entire net income from the trust estate shall be paid to Elizabeth Beatrice Maclean during her life.

In case of the death of said Elizabeth Beatrice Maclean before the death of John Alexander Maclean, then, upon her death this trust shall cease and the entire principal of the trust estate, together with any unpaid net income therefrom, shall immediately be and become the absolute estate of said John Alexander Maclean, free from all the trusts hereunder.

In case of the death of said Elizabeth Beatrice Maclean after the death of said John Alexander Maclean, then, upon her death this trust shall cease and the entire principal of the trust estate, together with any unpaid net income therefrom, shall be conveyed, transferred and assigned as said Elizabeth Beatrice Maclean may direct under her Last Will and Testament, and in case she makes no disposition thereof by a valid will then the same shall be

conveyed, transferred and assigned to her descendants then living, per stirpes and not per capita. In case the Trustee has no notice of a valid will of said Elizabeth Beatrice Maclean within three months after her death he shall be fully protected in acting upon the assumption that she made no testamentary disposition of said trust estate.

Said Elizabeth Beatrice Maclean hereby expressly reserves the right of revoking this indenture during the life of said John Alexander Maclean and with his consent only, either in whole or in part by notice in writing to the Trustee and in case of such revocation said trust estate, or the portion thereof as to which this indenture may be revoked, shall be re-conveyed by the Trustee to said Elizabeth Beatrice Maclean, free from all the trusts herein contained.

The Trustee may pay out of the trust estate as a whole any and all inheritance taxes which may be assessed against the trust estate or the interest of any beneficiary therein.

In Witness Whereof said Elizabeth Beatrice Maclean has hereunto set her hand and seal and said John Alexander Maclean, to evidence his acceptance of the trust has hereunto set his hand and seal the day and year first above written.

/s/ ELIZABETH B. MACLEAN.

State of Illinois,
County of Cook—ss.

I, Willis W. Parker, a Notary Public in and for the state and county aforesaid, Do Hereby Certify

that Elizabeth Beatrice Maclean, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this Twelfth day of January, 1923.

/s/ WILLIS W. PARKER,
Notary Public.

EXHIBIT B

The Northern Trust Company,

Acting under the right reserved under an Indenture of Trust from the undersigned, Elizabeth Beatrice Maclean to John Alexander Maclean, as Trustee, dated January 12, 1923, and by and with the approval of her husband, John Alexander Maclean, the undersigned Elizabeth Beatrice Maclean does hereby elect to revoke said Indenture of Trust dated January 12, 1923, and hereby directs John Alexander Maclean as Trustee thereunder to transfer all of the property now held under said trust to a new trust created by the undersigned Elizabeth Beatrice Maclean with The Northern Trust Company, Trustee, of even date herewith.

In Witness Whereof the undersigned Elizabeth Beatrice Maclean has hereunto signed her name and

John Alexander Maclean has also signed his name to evidence his approval of this revocation all this 27th day of May, 1931.

/s/ ELIZABETH BEATRICE
MACLEAN.

JOHN ALEXANDER
MACLEAN.

EXHIBIT C

This Indenture, made this 27th day of May, 1931, by Elizabeth Beatrice Maclean, of Chicago, Illinois, Witnesseth:

That said Elizabeth Beatrice Maclean, for and in consideration of One (\$1.) dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, does hereby convey, transfer and assign to The Northern Trust Company, as Trustee, the securities described in Schedule A hereto attached and made a part hereof, which schedule is signed by the parties hereto for identification, to Have and to Hold the same subject to the following trusts, purposes and conditions, to wit:

During the period of trusteeship as hereinafter fixed the Trustee shall hold, manage, care for and protect said trust estate and collect the income therefrom, all in accordance with its best judgment and discretion. The trustee may hold said trust estate

in its present form of investment and is also fully authorized to invest such part of the same as may be converted from time to time into cash in bonds, stocks, real estate mortgages, or in any other income-producing securities, that it thinks best, said Trustee to have as wide latitude in the selection and making of any investments as if it were the absolute owner of said property, and not to be restricted to investments for trustees as fixed by the laws of the State of Illinois. Said Trustee is hereby given full power to sell and convey any and all of said trust property and any reinvestment thereof from time to time for such prices and upon such terms as it sees fit and no purchaser or purchasers shall be obliged to see to the application of the purchase money; provided, however, that during the lifetime of Elizabeth Beatrice Maclean all sales and investments shall be subject to her approval, but no purchaser from the Trustee shall be obliged to see that such approval has been obtained.

In case any successor in trust should be at any time appointed for the trust estate such successor in trust shall have all the powers and discretions herein given to the original trustee. The Trustee shall receive reasonable compensation for its services and shall be reimbursed for all reasonable expenditures incurred by it in the management of the trust.

The entire net income from the trust estate shall be paid to Elizabeth Beatrice Maclean during her life, and from and after her death such net income shall be paid to John Alexander Maclean, husband

of Elizabeth Beatrice Maclean during the balance of his lifetime.

Upon the death of both Elizabeth Beatrice Maclean and John Alexander Maclean the trust estate shall be divided into two equal parts and be held for the benefit of Francis D. Maclean and Alan D. Maclean, sons of Elizabeth Beatrice Maclean and John Alexander Maclean, during their respective lives.

Upon the death of each of said sons after the trust fund has been set apart for his benefit, then said trust fund shall be held or distributed as such deceased son may have directed in and by his Last Will and Testament and in the absence of such direction shall go to his surviving descendants per stirpes and not per capita, and if there be none then the same shall be added to the fund of the remaining son if he still be living and if not shall go to the descendants of the remaining son then living per stirpes and not per capita.

In case either of said sons should die prior to the death of the one last surviving of Elizabeth Beatrice Maclean and John Alexander Maclean then the one-half share of the trust estate which would have been set apart for said son if living shall go to the descendants, if any, of said deceased son then living, per stirpes and not per capita, and if there be none shall be added to the share of the remaining son or if he likewise shall have died then the same shall go to the descendants of the remaining son then living, per stirpes and not per capita.

Said Elizabeth Beatrice Maclean hereby expressly reserves the right of revoking this indenture during the life of said John Alexander Maclean and with his consent only, either in whole or in part by notice in writing to the Trustee and in case of such revocation said trust estate, or the portion thereof as to which this indenture may be revoked, shall be reconveyed by the Trustee to said Elizabeth Beatrice Maclean, free from all the trusts herein contained.

In Witness Whereof said Elizabeth Beatrice Maclean has hereunto set her hand and seal and for the purpose of identification has signed her name at the foot of the two preceding pages, and said The Northern Trust Company, to evidence its acceptance of the trust has caused this instrument to be signed by its duly authorized officer on the day and year first above written.

/s/ ELIZABETH BEATRICE
MACLEAN.

THE NORTHERN TRUST
COMPANY,

By /s/ L. L. McARTHUR, JR.,
Vice President.

State of Illinois,
County of Cook—ss.

I, Walter J. Madigan, a Notary Public in and for the state and county aforesaid, do hereby certify

that Elizabeth Beatrice Maclean, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 27th day of May, 1931.

[Seal] /s/ WALTER J. MADIGAN,
Notary Public.

[Endorsed]: Filed September 29, 1958.

[Title of District Court and Cause.]

ADDITIONAL STIPULATION OF FACTS

The following Stipulation is added to the Stipulation of Facts herein, dated September 29, 1958.

XI.

John Alexander Maclean, husband of decedent Elizabeth Beatrice Maclean died February 19, 1941.

ERNEST R. MORTENSON, and
FREDERICK L. BOTSFORD,
Attorneys for Plaintiffs,

By /s/ERNEST R. MORTENSON.

LAUGHLIN E. WATERS,
United States Attorney;

EUGENE N. SHERMAN,
Assistant U. S. Attorney,
Attorneys for Defendant;

By /s/ EUGENE N. SHERMAN.

Dated: 20th day of November, 1958.

[Endorsed]: Filed November 20, 1958.

United States District Court for the Southern
District of California, Central Division

No. 506-58—HW Civil

ALAN D. MACLEAN and FRANCIS D. MAC-
LEAN,

Plaintiffs

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

The above-entitled cause came for trial on December 1, 1958, before the Honorable Harry C. Westover, Judge presiding, without the intervention of a jury. Plaintiffs were represented by their counsel, Ernest R. Mortenson and Frederick L. Botsford,

and the defendant by its counsel, Laughlin E. Waters, United States Attorney, Southern District of California; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Eugene N. Sherman, Assistant United States Attorney. The Court having heard and considered all the evidence, stipulation of facts, exhibits, and memoranda of counsel, makes the following findings of fact and conclusions of law.

Findings of Fact

I.

At all times pertinent hereto, plaintiffs were and now are citizens of the United States, and were the duly appointed and acting executors of the Estate of Elizabeth Beatrice Maclean, deceased.

II.

Said decedent died testate on February 20, 1954, a resident of the City of Pasadena, County of Los Angeles, State of California.

III.

The instant action was brought by plaintiffs in their said representative capacity against the defendant United States of America for refund of estate taxes and interest paid, as hereinafter set forth.

IV.

Under date of January 12, 1923, said decedent, as trustor, created a trust wherein her husband, John

Alexander Maclean, was named trustee, and the entire net income of the trust estate, consisting of securities, was reserved to decedent for her life. By the terms of said trust, decedent further reserved the right to revoke the trust during the life of her said husband and with his consent.

V.

On May 27, 1931, by a written document, the decedent expressly revoked the foregoing trust. Said revocation was made in pursuance of, and in compliance with, the right of revocation contained in said trust indenture.

VI.

By a trust indenture dated May 27, 1931, said decedent, on said date, created a new trust wherein she reserved unto herself for her life the entire net income of the trust estate, consisting of securities transferred from said revoked trust.

VII.

Said new trust substantially differed in its terms from said revoked trust; and it constituted a separate, distinct, and different trust from said revoked trust.

VIII.

Said new trust was not a continuation in modified form of said revoked trust.

IX.

Said new trust was revocable by the decedent, with the consent of her said husband, until his

death on February 19, 1941, at which time the trust became irrevocable.

X.

Said new trust was the trust in existence at the date of decedent's death on February 20, 1954.

XI.

On or about May 19, 1955, the plaintiffs, as executors of said estate, duly filed a United States Estate Tax Return for said estate with the District Director of Internal Revenue at Los Angeles, California. There was no estate tax shown to be due and payable on said return.

XII.

Thereafter, on or about August 15, 1957, the plaintiffs paid the sum of \$77,675.93 to the District Director of Internal Revenue at Los Angeles, California, as a deficiency of estate taxes and interest assessed by the Commissioner of Internal Revenue.

XIII.

Plaintiffs filed a timely claim for refund for the estate taxes and interest which were paid as hereinabove set forth, and the instant action was timely filed.

XIV.

All conclusions of law which are or are deemed to be findings of fact are hereby found as facts and are incorporated herein as findings of fact.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter and of the parties hereto.

II.

The plaintiffs have not sustained their burden of proving that the trust in existence at the date of decedent's death was the result of a transfer in trust made by decedent before March 4, 1931.

III.

The trust of May 27, 1931, constituted a new, separate, distinct, and different trust from the revoked trust of January 12, 1923.

IV.

Said new trust was not a continuation in modified form of said revoked trust.

V.

Said new trust was revocable by the decedent, with the consent of her said husband, until his death on February 19, 1941, at which time the trust became irrevocable.

VI.

Said new trust was the trust in existence at the date of decedent's death on February 20, 1954.

VII.

Said trust in existence at the date of decedent's death was the result of a transfer in trust made by the decedent after March 4, 1931, within the mean-

ing of Section 811(c)(1)(B) of the Internal Revenue Code of 1939, as amended, and within the meaning of the Joint Resolution of Congress of March 3, 1931 (46 Stat. 1516).

VIII.

The value of the property which comprised the corpus of said trust in existence at the date of decedent's death was includible in decedent's gross estate under Section 811(c)(1)(B) of the Internal Revenue Code of 1939, as amended, and under the Joint Resolution of Congress of March 3, 1931 (46 Stat. 1516).

IX.

All findings of fact which are deemed to be conclusions of law are hereby incorporated in these conclusions of law.

X.

Defendant is entitled to judgment that plaintiffs take nothing, that their complaint in the instant action be dismissed with prejudice, and for defendant's costs herein to be taxed by the Clerk of this Court.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed that:

- 1) The plaintiffs Allen D. Maclean and Francis D. Maclean take nothing;
- 2) Plaintiffs' complaint be dismissed with prejudice; and

3) The defendant do have and recover from the plaintiffs its costs taxed by the Clerk of this Court in the sum of \$20.00.

Dated: This 11th day of March, 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

Certificate of Service attached.

Lodged March 3, 1959.

[Endorsed]: Filed March 11, 1959.

Entered March 13, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Alan D. Maclean and Francis D. Maclean, the plaintiffs, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 13, 1959.

Dated: March 18, 1959.

ERNEST R. MORTENSON, and
FREDERICK L. BOTSFORD,

By /s/ ERNEST R. MORTENSON.

[Endorsed]: Filed March 19, 1959.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

A. Complaint, filed 5/28/58.

Answer of Defendant, filed 7/30/58.

Stipulation of Facts, filed 9/29/58.

Additional Stipulation of Facts, filed 11/20/58.

Findings of Fact; Conclusions of Law and Judgment, entered 3/13/59.

Notice of Appeal, filed 3/19/59.

Designation of contents of Record on Appeal and Statement of Points on which Appellant intends to rely, filed 4/16/59.

Dated: April 27, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16472. United States Court of Appeals for the Ninth Circuit. Alan D. Maclean and Francis D. Maclean, Appellants, vs. United States of America, Appellee. Transcript of the Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 23, 1959.

Docketed: May 18, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.